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Supreme Court, U.S.
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In the

Supreme Court of the United States

No. ____

OCTOBER TERM, 1981

The Board of Education of the North Little Rock, Arkansas, School District, George E. Miller, Superintendent, and George Stancil, President,

Petitioners,

VS.

Robert J. Davis and Lorene Joshua,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HERSCHEL H. FRIDAY and
ROBERT V. LIGHT
The First National Building
Twentieth Floor
Little Rock, Arkansas 72201
Telephone: 501/376-2011

Attorneys for Petitioners

QUESTIONS PRESENTED

I. Can the jurisdiction of a district court to supervise the operation of a school district be perpetuated by the summary grant of an application to intervene by a new plaintiff after the case has become moot as to the original plaintiffs because none of them continue to have a stake in its outcome?

II. Does the Constitution vest a district court with jurisdiction to continue its supervision of a school district's operations, including a continued imposition of a mandatory cross-district busing and manipulation of school assignments to achieve racial balance, where the district has operated a court-approved racially unitary school system since 1972?

LIST OF PARTIES

The parties in the Court of Appeals are those shown in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Davis v. Board of Education of the North Little Rock, School District*, 674 F.2d 684 (8th Cir. 1982) and appears in the Appendix herein, p. A-1. The order of the United States District Court for the Eastern District of Arkansas of August 7 and August 17, 1981 are reported at *Davis v. Board of Education of the North Little Rock, Arkansas, School District*, 520 F.Supp. 108 (E.D. Ark. 1981) and appear in the Appendix herein. The Judgment of the Court of Appeals is set forth in the Appendix, p. A-__.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Eighth Circuit was entered March 23, 1982.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Section 2 of Article III of the Constitution of the United States. Also involved are Rules 23 and 24 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioners last sought this Court's review in *Davis v. Board of Education*, 50 U.S.L.W. 3272 (1981). Certiorari was denied.

This school desegregation case was brought in 1968 pursuant the provisions of 42 U.S.C. §1983 seeking the desegregation of the North Little Rock School District. While never certified as a class action pursuant Rule 23, F.R.Civ.P., it was utilized as a vehicle by the district court, Hon. J. Smith Henley, to superintend desegregation of the school district. Under orders of the district court, ultimately reviewed and approved by the Court of Appeals with minor modifications (*Davis v. Board of Ed. of North Little Rock, Arkansas, School District*, 449 F.2d 500 (8th Cir. 1971), a racially unitary school system was achieved in September, 1972.

In 1975 petitioners applied to the district court, as they were required to do by the 1971 opinion of the Court of Appeals, for approval of proposed school construction. Another such application was made in 1976 at which time it was discovered that the court had not formally approved the 1975 application. Petitioners' motions of both 1975 and 1976 also sought dismissal of this litigation on grounds that this school system had been "unitary" since September, 1972, petitioners had fully discharged their constitutional obligations, and therefore there was no basis for continued jurisdiction of the district court.

Further proceedings followed, partially reviewed in *Davis v. Board of Ed. of North Little Rock, Arkansas, School District*, 635 F.2d 730 (8th Cir. 1980), which included an Order of the district court announced at pre-trial conference on April 22, 1977 allowing intervention of a new party plaintiff (Mrs. Joshua) over objections of petitioners to replace the incumbent plaintiff (Mr. Davis) who had moved out of the school district with his family more than a year earlier.

A three-day trial followed before Judge Shell who entered a Memorandum Opinion and Order on Sptember 13, 1977 purporting to dispose of the issues that had been presented but not dealing with petitioners' objections respecting jurisdiction based on lack of a plaintiff with standing to assert a case or controversy under Article III. Timely motions to revise that Opinion and Order were filed under Rules 52 and 29, F.R.Civ.P.

Judge Shell took no further substantive action in the case prior to his death in June, 1978. Ultimately, on June 29, 1979, Judge Roy to whom the case has been assigned entered an order declining to consider the motion of petitioners seeking amendment of Judge Shell's September 13, 1977 order. The Court of Appeals affirmed the district court in all respects on appeal from Judge Roy's order. *Davis v. Board of Education of the North Little Rock, Arkansas, School District*, 635 F.2d 730 (8th Cir. 1980). However, it did not address in its opinion petitioners' Article III arguments relating to mootness and lack of any plaintiff with standing to continue prosecution of the case. This Court denied certiorari, Justice Rehnquist filing a dissenting opinion supporting the grant of review on essentially the same question as is now presented under Question Presented No. I. 50 U.S.L.W. 3272 (1981).

On May 22, 1981 petitioners sought, as still required by the Court of Appeals' 1971 decision, approval of the district court to close a school facility. This was opposed by counsel for Mrs. Joshua who had been permitted to intervene in 1977. A trial on the merits before Judge Woods, to whom the case had been reassigned, resulted in approval of petitioners' application. For the first time in this protracted litigation the district court acknowledged that "serious questions have been raised as to intervenor's standing."

The Court of Appeals affirmed. *Davis v. Board of Education of the North Little Rock, Arkansas, School*

District, 674 F.2d 684 (8th Cir. 1981). This time it did address briefly petitioners' arguments of lack of an Article III case or controversy, and rejected them.

Review is now sought on the determination, or assumption, of continued jurisdiction by the courts below of this case which by standards clearly articulated by this Court has been moot for several years.

REASONS FOR GRANTING THE WRIT

The decisions of the courts below so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in that the district court did no more than acknowledge petitioners' claim that this case is moot and the Court of Appeals summarily disposed of this claim on the ground that it had previously instructed the district court to retain jurisdiction. Moreover, the decisions of the courts below rest on the implicit assumption that the jurisdiction of a district court in a school desegregation case continues so long as any lawyer or person seeking to be made a party makes a racially-oriented complaint about the operation of the school system. This is contrary to the applicable decisions of this Court and is in conflict with those of other courts of appeals.

I.

CAN THE JURISDICTION OF A DISTRICT COURT TO SUPERVISE THE OPERATION OF A SCHOOL DISTRICT BE PERPETUATED BY THE SUMMARY GRANT OF AN APPLICATION TO INTERVENE BY A NEW PLAINTIFF AFTER THE CASE HAS BECOME MOOT AS TO THE ORIGINAL PLAINTIFFS BECAUSE NONE OF THEM CONTINUE TO HAVE A STAKE IN ITS OUTCOME?

The case became moot and the district judge so apprised before he undertook the three-day trial in 1977. The suit was originally brought by Mr. Graves on behalf of his minor children attending petitioners' schools. Prior to reaching the Court of Appeals in 1971 Mr. Davis was substituted as plaintiff on behalf of his children attending these schools because the Graves children were no longer in the school system. On April 21, 1977 petitioners filed a motion to dismiss asserting that during the course of his deposition on the day before Mr. Davis disclosed that he had moved his residence out of the North Little Rock School District about January 1, 1976, that his minor children had withdrawn from the schools of the district about that date, and none of them thereafter had connection with the school district.

Counsel for respondents sought to cure this jurisdictional defect by filing an application for intervention by Mrs. Joshua on behalf of her children on April 20, 1977. Over objection of petitioners Judge Shell ruled in a pre-trial conference on April 22, 1977, not attending by a court reporter, that he would grant this application and deny the motion to dismiss. In response to the request of petitioners' counsel he confirmed this ruling at the commencement of the trial on April 25, 1977.

Even if the court's jurisdiction at the time had been unquestioned, the intervention clearly was untimely under Rule 24, F.R.Civ.P. [1] However, it was vigorously urged that jurisdiction had abated both because of the District's unitary status for five years and because the case had become moot. The district court brushed aside both objections summarily. Thus Mrs. Joshua was permitted to

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[1] This well-publicized suit had been pending since 1968 and Mrs. Joshua did not alleged lack of knowledge of its pendency to excuse delay in seeking intervention. See *NAACP v. New York*, 413 U.S. 345 (1973). Intervention was not intended as a vehicle to revive stale and abated litigation.

keep afloat a non-certified class action simply on the assertion in her application that she sought to represent "members of the class purportedly represented by Robert J. Davis, et al."

On appeal from Judge Shell's order the Court of Appeals simply ignored the claim of mootness. *Davis v. North Little Rock, Arkansas, School District*, 536 F.2d 730 (8th Cir. 1980), for which it was criticized by Justice Rehnquist in his dissent from the denial of certiorari. 50 U.S.L.W. 3272 (1981). In the most recent proceedings before the district court it did, for the first time, acknowledge that the challenge to intervenor's standing raised "serious questions" but resolved them in favor of jurisdiction without any discussion of the principle of mootness or its Article III implications. (A. ____)

This time the Court of Appeals devotes the last two paragraphs of its opinion to the Article III challenge. *Davis v. Board of Education*, 674 F.2d 684, 689 (8th Cir. 1982). It is rejected on the grounds that it (the Court of Appeals) has directed the district court "to maintain jurisdiction until full integration is achieved" and that petitioners have recognized the continuing authority of the district court in the matter by repeated applications to it for approval of administrative decisions relative to the operation of the school system. These applications were required by the prior orders of the courts below, especially that of the Court of Appeals in 1971, and obedience to such judicial mandates hardly can be regarded as admitting the jurisdiction to issue them.

The constitutional requirement that jurisdiction of the federal courts is confined to a justiciable controversy *between the parties* is perverted by the courts below by the artifice of essentially ignoring petitioners' arguments on the issue which they have advanced for now over five years. This is illustrated by the testimony of counsel for intervenor, called to testify at the most recent hearing

before Judge Woods on the issues of standing and mootness, who responded to a question designed to show that no motion had ever been made in this case for certification under Rule 23:

> "Just recently in the brief to the Court of Appeals, Mr. Light, you indicated that the question of standing had not been addressed in the past and the Court of Appeals ignored you, went ahead and ruled that the Court has to maintain jurisdiction of the matter, and your point of view with respect to standing was therefore rejected." (T. 14)

The applicable standards were clear enough when the district court made its decision in 1977. The intervention of the United States in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) before answer was filed is all that saved the case from being dismissed as clearly moot, and the Court's assessment of the status of the other plaintiffs is squarely applicable here:

> "But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. *And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena Public Schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation.*" (Emphasis added) 427 U.S. 424, 430.

The course adopted by the district court also disregarded the teachings of *Sosna v. Iowa*, 419 U.S. 393 (1975) where certification pursuant Rule 23 by the district court while the named plaintiff had standing (a status lost while the case was on appeal) saved the case from abating as moot, and *Indianapolis School Commissioners v. Jacobs*, 420 U.S. 128 (1975) where such a loss of standing resulted in vacating the

judgments of the lower courts and dismissal of the complaint because, as in the case at bar, there was no such certification.

In the context here presented the interrelated questions of standing and mootness have constitutional dimensions. *Warth v. Seldin*, 422 U.S. 490 (1975); *Valley Forge Christian College v. Americans United for Separation of Church and State*, ____ U.S. ____, 70 L.Ed.2d 700 (1982). However, the courts below refused to recognize them.

Petitioners invoke this Court's supervisory power to remedy disposition by the courts below of meritorious jurisdiction defenses by esssentially ignoring them. Since this is the only remedy afforded in our system for such error it is respectfully urged that the fundamental considerations of justice and due process command the granting of review.

II.

DOES THE CONSTITUTION VEST A DISTRICT COURT WITH JURISDICTION TO CONTINUE ITS SUPERVISION OF A SCHOOL DISTRICT'S OPERATIONS, INCLUDING A CONTINUED IMPOSITION OF A MANDATORY CROSS-DISTRICT BUSING AND MANIPULATION OF SCHOOL ASSIGNMENTS TO ACHIEVE RACIAL BALANCE, WHERE THE DISTRICT HAS OPERATED A COURT-APPROVED RACIALLY UNITARY SCHOOL SYSTEM SINCE 1972?

A basic principle in our jurisprudence is that "Public policy dictates that there be an end of litigation;" *Baldwin v. Iowa State Traveling Men's Asso.*, 283 U.S. 522, 525 (1931). When the district courts should return the management of the schools to local authorities pursuant this principle remains an unsettled question.

This Court said in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955):

> "During this period of transition, the courts will retain jurisdiction of these cases."

Subsequent amplifications of that mandate have not provided the lower federal courts the guidance essential to fashion a uniform rule in this matter of critical national concern. In *Green v. School Board of New Kent County*, 391 U.S. 430, 439 (1968) it was said:

> " * * * the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."

A similar observation was made on the same day in *Raney v. Board of Education*, 391 U.S. 443, 449 (1968). But it was suggested in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971) that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated" there was no longer a constitutional violation to support continued jurisdiction in the district court. This concept was articulated in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) in these terms:

> "For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

In the case at bar the district court has refused to dismiss although it had found as early as 1973 that "satisfactory racial integration of all twelve grades of the

North Little Rock School System and of staff and faculty has been achieved" [2] and respondents had conceded in 1975 that this school district has been operating a "unitary system". [3] The grievances that the district court allowed respondents to inject in the 1977 trial did not challenge the desegregation plan which had long had that court's approval, but dealt with dissatisfaction of some individuals concerning the manner in which the operation of the plan affected them or others for whom they undertook to speak.

This is in contrast to the well reasoned, and unappealed, decision in *United States v. Corinth Municipal Separate School District*, 414 F. Supp. 1336 (N.D. Miss. 1976) where the suit was dismissed notwithstanding claims of racial discrimination not directed toward the plan itself. The court viewed these claims as advanced "to serve as a vehicle by which the total operation of the public schools in that district may be held interminably subject to federal court jurisdiction." It concluded:

> "Here, we believe that, as a federal court, we have no further constitutional function to perform in this school system. The journey of the Corinth school district from *Brown I* to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), has been successfully completed. Since this is so, the words of Chief Justice Burger, speaking for a unanimous court, are appropriate:
>
> > 'At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green (Green v. County School*

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[2] *Davis v. Board of Education*, 362 F. Supp. 730 (E.D. Ark. 1973).

[3] Motion of plaintiffs filed April 30, 1975.

Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716) and *Alexander*[*Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19).' "

The conflicting views of these two district courts are reflected in those of the courts of appeals attempting to deal with this recurring issue. The Fifth Circuit adopted the rule that the district courts should retain jurisdiction for a "reasonable time" after finding a school system to be unitary in order to insure that the state imposed segregation has been completely removed. *Bradley v. Board of Public Instruction of Pinellas County, Florida*, 431 F.2d 1377 (5th Cir. 1970); *Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883 (5th Cir. 1970); *Mannings v. Board of Public Instruction of Hillsborough County, Florida*, 427 F.2d 874 (5th Cir. 1970). Later decisions in that circuit hold that the district courts should relinquish jurisdiction three years after finding a system to be unitary if it has continued to meet that standard.[4]

Other circuits have held that jurisdiction should be retained until "disestablishment" of the dual school system has been achieved. *Morgan v. Kerrigan*, 523 F.2d 917 (1st Cir. 1975); *Evans v. Buchanan*, 582 F.2d 750 (3rd Cir. 1978); *Sloan v. Tenth School District of Wilson County, Tennessee*, 433 F.2d 587 (6th Cir. 1970).

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[4] *United States v. Texas*, 509 F.2d 192 (5th Cir. 1975); *United States v. Texas Education Agency*, 467 F.2d 848 (5th Cir. 1972); *Cisnero v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972); *Calhoun v. Cook*, 451 F.2d 583 (5th Cir. 1971); *Youngblood v. Board of Public Instruction of Bay County, Florida*, 448 F.2d 770 (5th Cir. 1971); *Steele v. Board of Leon County, Florida*, 448 F.2d 767 (5th Cir. 1971); *Wright v. Board of Public Instruction of Alachua County, Florida*, 445 F.2d 1397 (5th Cir. 1971); *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5th Cir. 1971).

Still a different standard has been adopted in the Fourth and Eighth Circuits which require that jurisdiction be retained, apparently in perpetuity, to insure that the approved plan "is operated in a constitutionally permissible fashion". *Kelley v. Altheimer, Arkansas Public School District*, 378 F.2d 483 (8th Cir. 1967); *Haney v. County Board of Education*, 429 F.2d 364 (8th Cir. 1970); *Felder v. Harnett County Board of Education*, 409 F.2d 1070 (4th Cir. 1969).

The requirement of the Court of Appeals in the case at bar that the district court "retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated" (635 F.2d 730, 733) and "until such time as the district court determines that a unitary system of education has been achieved and the North Little Rock School District is thoroughly integrated" (674 F.2d 684, 689) fall in the latter class of decisions.

The difference in the foregoing rules is one of substance. One group of rules relinquishes control of the school system that has attained unitary status to the local authorities who are best equipped to deal with the day by day management of the schools including resolution in the first instance of questions that inevitably arise with legal implications. The courts below have elected a rule that transfers to the federal judiciary supervision of the schools with no intelligible standard by which that intervention ever can be terminated.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit on the two questions presented.

Respectfully submitted,

HERSCHEL H. FRIDAY and
ROBERT V. LIGHT
The First National Building
Twentieth Floor
Little Rock, Arkansas 72201
Telephone: 501/376-2011

Attorneys for Petitioners

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